

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA No. 1392/2010**  
**ITA NO. 1567/2010**  
**ITA NO. 1568/2010**

% *Judgment delivered on:31.01.2011*

**(1) ITA No. 1392/2010**

**THE DIRECTOR OF INCOME TAX** . . . **APPELLANT**  
Through : Mr. Sanjeev Sabharwal, Sr. Standing  
Counsel

VERSUS

**DSD NOELL GMBH** . . . **RESPONDENT**  
Through : Mr. Rajan Bhatia, Advocate

**(2) ITA NO.1567/2010**

**THE DIRECTOR OF INCOME TAX** . . . **APPELLANT**  
Through : Mr. Sanjeev Sabharwal, Sr. Standing  
Counsel

VERSUS

**DSD INDUSTRIEANLAGEN GMBH** . . . **RESPONDENT**  
Through : Mr. Rajan Bhatia, Advocate

**(3) ITA NO. 1568/2010**

**THE DIRECTOR OF INCOME TAX** . . . **APPELLANT**  
Through : Through : Mr. Sanjeev Sabharwal, Sr.  
Standing Counsel

VERSUS

**DSD INDUSTRIEANLAGEN GMBH** . . . **RESPONDENT**  
Through: Mr. Rajan Bhatia, Advocate

**CORAM :-**

**HON'BLE MR. JUSTICE A.K. SIKRI  
HON'BLE MR. JUSTICE M.L. MEHTA**

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

**A.K. SIKRI, J (ORAL)**

1. The admitted facts are that the respondent/assessee is a German Company. It set up a Project Office in India in the year 2000 for providing engineering and technical services for various projects. These projects are duly sanctioned by the Central government as well. The assessee for the assessment years 2004-05 and 2005-06 filed its return claiming the benefits under Section 44BBB of the Income-Tax Act (hereinafter referred to as the 'Act'). Section 44BBB of the Act reads as under:-

“44BBB. (1) Notwithstanding anything to the contrary contained in Section 28 to 44AA, in the case of an assessee, being a foreign company, engaged in the business of civil construction or the business of erection of plant or machinery or testing or commissioning thereof, in connection with a turnkey power project approved by the Central Government in this behalf, a sum equal to ten per cent of the amount paid or payable (whether in or out of India) to the said assessee or to any person on his behalf on account of such civil construction, erection, testing or commissioning shall be deemed to be the profits and gains of such business chargeable to tax under the head “Profits and gains of business or profession.

(2) Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains

than the profits and gains specified in that sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of the Section 44AA and gets his accounts audited and furnished a report of such audit as required under Section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under sub-section (3) of Section 143 and determine the sum payable by, or refundable to, the assessee”.

2. It is not in dispute that the assessee fulfills all the conditions stipulated in sub-Section (1) of Section 44BBB of the Act. It is stated on behalf of the assessee that a sum equal to 10 per cent of the amount paid or payable to the assessee under the projects undertaken by it be treated as deemed profits and gains chargeable to tax under the head “Profits and gains of business or profession”. The Assessing Officer did not accept the aforesaid contention of the assessee, as according to him, on the basis of books of accounts maintained by the assessee, the profits could be more than 10 per cent. Forming this opinion, the Assessing Officer took shelter of sub-section (2) of the Act and observed that as the assessee was maintaining the books of accounts and on the basis of those documents it could be shown that it was earning more than 10 per cent profits, then actual profits should be brought to tax. The assessee preferred appeals against this order of the Assessing Officer which were dismissed by the CIT (A). However, in further appeals to the Income Tax Appellate Tribunal (hereinafter referred to as the ‘Tribunal’), the assessee has succeeded. The Tribunal has held the view that Section 44 BBB of the Act is a

provision for computing the profits and gains of foreign companies engaged in the business of civil construction, erection and turnkey power projects and profits and gains of such foreign companies are to be computed in accordance with the said provision. The view taken by the Tribunal is perfectly justified on correct interpretation of the aforesaid provision. It is clear from the reading of this section that it starts with non-obstante clause by clearly stating "Notwithstanding anything to the contrary contained in Section 28 to 44AA". It is thus clear that the computation of profits in respect of other assesseees as provided in the aforesaid provisions namely Section 28 to 44AA of the Act would not be applicable in the case of those foreign companies who fulfill the conditions laid down under Section 44BBB of the Act. In cases of such companies, this provisions which is fictional in nature is made which specifies that a sum equal to 10 per cent of the amount paid or payable to the assessee or to any person on his behalf shall be deemed to be the profits and gains of such persons chargeable to tax.

3. The reliance placed by the Assessing Officer on sub-Section (2) is clearly misconceived. The provision made in sub Section (2) is for the benefit of the assessee which is clear from the words "the assessee may claim lower profits and gains than the profits and gains specified in sub-section (1)". Thus, even when sub-Section (1) provides for a sum equal to 10 per cent of the amount paid or payable as deemed profits, the assessee is given a chance to demonstrate and prove before the Assessing Officer that actual profits earned by the assessee

were less than 10 per cent. The condition is that the assessee should keep and maintain such books of accounts and other documents as required under sub- Section (2) of Section 44AA of the Act and to get his accounts audited and also furnish report of such audited accounts as required under Section 44AB of the Act. On the basis of this provision, the Revenue cannot plead or make out a case that the profits earned by the assessee are more than 10 per cent. In so far as Revenue is concerned, it has to feel contended by what is provided in sub-Section (1) thereof namely maximum of 10 per cent of the amount paid or payable as profits and gains of such business chargeable to tax.

4. We, thus, find no merits in these appeals and are accordingly dismissed.

**(A.K. SIKRI)**  
**JUDGE**

**(M.L. MEHTA)**  
**JUDGE**

**January 31, 2011**  
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